

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA)	
)	
v.)	Misc. No. 06-14-P-H
)	
LISE L. McLAIN,)	
)	
Respondent)	

**CERTIFICATION OF FACTS FOR A FINDING OF CONTEMPT
AND ORDER TO SHOW CAUSE**

The instant action commenced on February 15, 2006 with the filing by the government of a petition to enforce an Internal Revenue Service (“IRS”) summons. *See* Petition To Enforce Internal Revenue Service Summons (“Enforcement Petition”) (Docket No. 1). On March 27, 2006, following the holding of a show-cause hearing at which the *pro se* respondent was present, I issued an order directing that the respondent comply with the summons. *See* Minute Entry (Docket No. 6); Order Enforcing Internal Revenue Service Summons (“Enforcement Order”) (Docket No. 7). The government now moves for an order of contempt against the respondent, asserting that she has failed to comply with the Enforcement Order. *See* Motion for an Order of Contempt Against Lise L. McLain (“Motion for Contempt”) (Docket No. 11). In accordance with 28 U.S.C. § 636(e)(6)(B)(iii), I certify facts that, in my view, support a finding of contempt on the part of the respondent, and hereby order her to appear before United States District Judge D. Brock Hornby, at the date, time and place specified below, to show cause why she should

not be held in contempt of court.

I. Discussion

A. Applicable Legal Standards

In this case, the government requests that the respondent be held in civil contempt of court and incarcerated until such time as she “purges” the contempt by complying with the Enforcement Order. *See* Motion for Contempt at 3-4; *see also, e.g., United States v. Saccoccia*, 433 F.3d 19, 27 (1st Cir. 2005) (“Civil contempt may be imposed to compel compliance with a court order or to compensate a party harmed by non-compliance.”); *United States v. Perry*, 116 F.3d 952, 956 (1st Cir. 1997) (“[T]he paradigmatic civil contempt sanction is coercive, designed to exact compliance with a prior court order. Imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. The contemnor is confined indefinitely with release dependent on ‘purging’ the contempt by complying with the order.”) (citation and internal punctuation omitted).¹

“A complainant must prove civil contempt by clear and convincing evidence.” *AccuSoft Corp. v. Palo*, 237 F.3d 31, 47 (1st Cir. 2001) (citations and internal quotation marks omitted). “In addition, contempt may only be established if the order allegedly violated is clear and unambiguous.” *Id.* (citations and internal quotation marks omitted); *see also, e.g., Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 77 (1st Cir. 2002) (moving party must “establish by clear and convincing evidence that the putative

¹ “Generally, a court may impose civil contempt sanctions pursuant to the minimal procedures of notice and an opportunity to be heard; the reason for this is that the civil contemnor may avoid the sanction by obeying the court’s order.” *United States v. Winter*, 70 F.3d 655, 661 (1st Cir. 1995). “In contrast, criminal contempt is a crime in the ordinary sense, and criminal contempt sanctions may be imposed only if the court provides certain constitutional protections.” *Id.* (continued on next page)

contemnor violated the relevant court order.”). The validity of the underlying order is taken as a given; it may not be challenged for the first time in a contempt proceeding. *See, e.g., United States v. Lawn Builders of New Eng., Inc.*, 856 F.2d 388, 395 (1st Cir. 1988) (“A contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.”) (citation and internal punctuation omitted); *see also, e.g., United States v. Rylander*, 460 U.S. 752, 757 (1983) (“Because a proceeding to enforce an IRS summons is an adversary proceeding in which the defendant may contest the summons on any appropriate ground, and because lack of possession or control of records is surely such a ground, the issue may not be raised for the first time in a contempt proceeding.”) (citations and internal quotation marks omitted).

Nonetheless, a finding of civil contempt may yet be averted in certain circumstances short of letter-perfect compliance with a court order; for example, if a putative contemnor establishes (i) a *present* inability to produce requested documents or (ii) substantial compliance with the underlying order. *See, e.g., Rylander*, 460 U.S. at 757 (“In a civil contempt proceeding such as this, of course, a defendant may assert a *present* inability to comply with the order in question. While the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. . . . It is settled, however, that in raising this defense, the defendant has a burden of production.”) (citations omitted) (emphasis in original); *AccuSoft*, 237 F.3d at 47 (“[W]hile good-faith efforts alone do not insulate a defendant in a contempt action, our precedent permits a finding of contempt to be averted where diligent efforts result in substantial compliance with the underlying order. The determination of whether substantial compliance has been achieved will depend on the circumstances of each case, including the nature of the interest at stake and the

(citations and internal quotation marks omitted).

degree to which noncompliance affects that interest.”) (citations and internal quotation marks omitted); *Langton v. Johnson*, 928 F.2d 1206, 1220 (1st Cir. 1991) (“[S]ubstantial compliance can avert a finding of contempt. That is to say, the decrees here at issue, like most such decrees, were susceptible to satisfaction by diligent, good faith efforts, culminating in substantial compliance.”).

In this circuit, good faith or lack of willfulness, standing alone, does not constitute a defense to civil contempt. *See, e.g., Goya Foods*, 290 F.3d at 76 (“The law is firmly established in this circuit that good faith is not a defense to civil contempt.”); *Star Fin. Servs., Inc. v. AASTAR Mortgage Corp.*, 89 F.3d 5, 13 (1st Cir. 1996) (“[G]ood faith, or the absence of willfulness, does not relieve a party from civil contempt in the face of a clear order.”). Nor does a self-imposed inability to produce requested documents. *See, e.g., In re Power Recovery Sys., Inc.*, 950 F.2d 798, 803 (1st Cir. 1991) (“Granted, a party may defend contempt and failure to comply on the grounds that compliance was impossible; self-induced inability, however, does not meet the test.”) (footnotes omitted).

When, as here, “the court’s purpose is to coerce compliance, the available remedies include imprisonment of the contemnor until he purges himself of contempt by complying with the order and a prospective, conditional fine.” *G. & C. Merriam Co. v. Webster Dictionary Co.*, 639 F.2d 29, 41 n.13 (1st Cir. 1980) (citations omitted).

The government’s motion implicates section 636(e) of the United States Magistrate Judges Act, pursuant to which, in a proceeding such as this in which an act is asserted to constitute civil contempt of a magistrate judge’s order,

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day

certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

28 U.S.C. § 636(e)(6)(B)(iii); *see also, e.g., JSC Foreign Econ. Ass'n Technostroyexport v. International Dev. & Trade Servs., Inc.*, No. 03 Civ. 5562(JGK)(AJP), 2006 WL 1148110, at *1 (S.D.N.Y. Apr. 28, 2006) (“Where the magistrate judge has certified facts constituting contempt, the district court must make an independent determination of the facts certified and consider any additional evidence. The determination of whether the conduct constitutes contempt and, if so, what sanctions are appropriate are left to the discretion of the district court.”) (citations omitted).

B. Certification of Facts

Pursuant to 28 U.S.C. § 636(e)(6)(B)(iii), I hereby certify to Judge Hornby the following facts, which, in my view, support a finding of contempt by the respondent:

1. M. Gagne is a duly commissioned revenue officer employed in the Small Business/Self Employed Division of the Office of the Area Director of the IRS in Lewiston, Maine. *See* Second Declaration of M. Gagne (“Second Gagne Decl.”), Exh. B to Motion for Contempt, ¶ 1.

2. In his/her capacity as a revenue officer, Gagne has been investigating respondent McLain’s tax liability for the periods ending December 31, 2000 and December 31, 2001. *Id.* ¶ 2.²

3. In connection with that investigation, on August 8, 2005 Gagne served on the respondent an administrative summons requiring her to give testimony and produce documents as described in the summons. *See* Declaration of Revenue Officer (“First Gagne Decl.”), Attach. #2 to Enforcement Petition,

² M. Gagne’s affidavit does not make clear his/her gender. *See generally* Second Gagne Decl.

¶¶ 3-4; Summons, Exh. A to Enforcement Petition.

4. The Summons required the respondent to appear before Gagne in Lewiston on August 30, 2005, to give testimony and to bring with her and produce for examination:

All documents in your possession and control reflecting the assets and liabilities of the above name taxpayer(s) [Lise L. McLain] including, but not limited to, the following: all bank statements, checkbooks, canceled checks, savings account passbooks, and records of certificates of deposit, for the period January 1, 2004 to July 31, 2005, regarding accounts or assets held in the name of the taxpayer(s) or held for the benefit of the taxpayer(s); all records or documents regarding stocks and bonds, deeds or contracts regarding real property, current registration certificates for motor vehicles, and life or health insurance policies currently in force, any of which items are owned, wholly or partially, by the taxpayer(s), or in which the taxpayer(s) have a security interest, or held for the benefit of either or both of the taxpayer(s), so that a current Collection Information Statement may be prepared.

Summons.

5. On August 30, 2005, the respondent failed to comply with the Summons. *See* First Gagne Decl. ¶ 5. She continued to refuse to comply with the Summons through the date of Gagne's first affidavit (December 1, 2005). *See id.*

6. On February 15, 2006 the government filed the instant Enforcement Petition. *See* Docket No. 1. By order dated February 21, 2006, I directed the respondent to appear before me on March 27, 2006 to show cause why she should not be compelled to obey the Summons. *See* Order To Show Cause (Docket No. 2).

7. A show-cause hearing was held before me on March 27, 2006, at which both the *pro se* respondent and counsel for the government appeared. Following that hearing, I issued an order directing that the respondent appear before Gagne or any other officer of the IRS and produce the documents described in the Summons and allow the IRS to examine the records and take testimony on or before April

12, 2006 at the IRS office in Lewiston, Maine. *See* Enforcement Order. I also stated: “Failure to comply with this order shall make the respondent liable for a finding of contempt of court.” *Id.*

8. On April 12, 2006 the respondent appeared before Gagne. *See* Second Gagne Decl. ¶ 4. As is reflected in transcripts prepared by both Gagne and the respondent of a tape recording of that meeting, the respondent did not provide to Gagne the documents and information described in the Summons. *See id.*; Notice of Transcript of Taped Hearing Dated April 12, 2006 at the Internal Revenue Service at Lewiston, Maine, Exh. C to Motion for Contempt; Taped Interview in Response to a Summons Between M. Gagne, Revenue Officer, Collection Group 26, Lise L. McLain and Stephen Joseph McLain Jr., Exh. B-1 to Motion for Contempt.³

II. Conclusion and Order To Show Cause

Upon the Motion for Contempt and the facts certified above, and in accordance with 28 U.S.C. § 636(e)(6)(B)(iii), it is hereby **ORDERED** that the respondent appear before United States District Court

³ The respondent filed a six-page memorandum in opposition to the Motion for Contempt to which she appended a number of documents. *See* Notice of Request To Strike the Contempt Charge Against Lise L. McLain (“Contempt Opposition”) (Docket No. 15). I have carefully considered these materials, determining that they raise no issue necessitating an evidentiary hearing or otherwise call into question the relevant facts as I have certified them. *See, e.g., Goya Foods*, 290 F.3d at 77 (“[A] party has a right to an evidentiary hearing in a civil contempt proceeding only if, and to the extent that, genuine issues of material fact exist.”). The bulk of the respondent’s submission is non-responsive to the issues presented by the government’s motion. She does assert that (i) she did not notice until she transcribed the tape of the April 12, 2006 meeting that Gagne was referring to the taxable years 2004 and 2005 (rather than 2000 and 2001), (ii) she sincerely believed she was providing the required books and records, and (iii) she attempted to provide the books and records as requested but was cut off by Gagne. *See* Affidavit of Negative Averment, attached to Contempt Opposition, ¶¶ 82-86, 90. As noted above, good faith, standing alone, is insufficient to avert a finding of contempt. *See, e.g., Goya Foods*, 290 F.3d at 76. The respondent’s subjective beliefs and perceptions, even if sincerely espoused, do not controvert the government’s clear and convincing evidence that (i) the respondent was served on August 8, 2005 with a Summons stating that records were sought for the period January 1, 2004 to July 31, 2005, *see* Summons, and (ii) when pointedly asked by Gagne on April 12, 2006 whether she had brought with her certain of the required documents (such as bank statements, checkbooks and canceled checks), she persisted in calling Gagne’s attention to non-responsive documents such as a Uniform Commercial Code form, an indemnity bond and a purported settlement agreement between the parties, whereupon Gagne terminated the meeting. *See* Exhs. B-1, C to Motion for Contempt. Nor does the respondent offer evidence that, at any time since the April 12, 2006 meeting, she has provided to Gagne or any other IRS
(continued on next page)

Judge D. Brock Hornby, in Courtroom 2 of the United States Courthouse, 156 Federal Street, Portland, Maine 04101 **on the 29th day of June, 2006 at 1 p.m.** to show cause why she should not be held in contempt of court for failure to comply with this court's Order Enforcing Internal Revenue Service Summons dated March 27, 2006.

So ordered.

Dated this 7th day of June, 2006

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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officer documents responsive to the Summons. *See generally* Contempt Opposition.

V.

Defendant

LISE L MCLAIN

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